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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JORGE SALGADO,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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ATTORNEY FOR PETITIONER

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FIRST QUESTION PRESENTED

Whether the Circuit Court reversibly erred in failing to notice the numerous plain errors affecting substantial rights of Salgado although those errors were not brought to the attention of the courts below but were first raised at this Court in this petition for certiorari.

SECOND QUESTION PRESENTED

Whether Salgado was denied his constitutional right to effective assistance of counsel, when Salgado's previous attorneys failed to perform within the range of competence demanded in criminal cases and failed to assure Salgado an adequate opportunity to present his claims fairly in the context of not only the federal appellate process but also the pre-trial, trial and sentencing stages of this case.

THIRD QUESTION PRESENTED

Whether there was an illegal seizure of evidence after searches of Salgado's Apartment 211 which was located at 2580 Gulf Road, Glenview, Illinois, where:

1) prior to the officers' warrantless "cursory search" of apartment 211, there was absolutely no probable cause to believe cocaine was in apartment 211 since Bernal told the officers he had gotten the cocaine elsewhere;

2) contrary to the circuit court's factual finding, the record evidence clearly shows that the issuing magistrate was unaware officer Lett's search warrant affidavit was partially based on information obtained by the officers during their initial warrantless "cursory search" through apartment 211; and

3) officer Lett's affidavit was made with at least reckless disregard for the truth when Lett falsely stated that apartment 211 at 2580 Gulf Road was the apartment to which Bernal took Agent Dailey, and from which Bernal had obtained the cocaine.

FOURTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed Count 5's sentence, since that 20 years sentence and $500,000 fine exceeded the statutory maximum punishment prescribed by 21 U.S.C. 843(c).

FIFTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the convictions and the unenhanced sentences of a $500,000 fine and twenty years imprisonment, since those sentences exceeded the statutory maximum of fifteen years punishment prescribed in 21 U.S.C. 841(b)(1)(B) where on the trial court's instructions which authorized the jury to convict of only lesser included offenses, the jury only could have found that:

(a) as to counts 3 and 4, the government proved the following:

> "First, that the defendant possessed a quantity of a mixture containing cocaine; second, that the defendant did so knowingly, and, third, that at the time the defendant possessed the cocaine he intended to distribute it"

(A. 76 for Count 3; A. 77 for Count 4); and

(b) as to count 2, the government proved:

> "... the following propositions: First, that the defendant distributed a quantity of a mixture

containing cocaine and, second, that at the time the defendant distributed the cocaine he did so knowingly and intentionally" (A. 75); and

(c) as to count 1, the government proved:

"... following propositions: First, that a conspiracy existed to possess and distribute cocaine as described in Count 1, and, second, that the defendant, Jorge Salgado, knowingly and intentionally became a member of the conspiracy" (A. 73); although

(d) the purities and weights of the government's cocaine exhibits are as follows:

Exhibits	Grams: net/gross	%
No. C-1	28.1 / 50.6	93
No. C-2	971 / 1350	93
No. C-3	913 / 1253	96
No. C-4	40 / 349	92
No. C-5-A	12,067 / 16,800	93

and (e) those exhibits allegedly involved: Exhibit C-1 is Counts 2's sample; Exhibit C-2 is Count 3's remainder of a kilo; and Exhibits C-3, C-4 and C-5-A applied to Count 4's stash at apartment 211.

SIXTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the sentences on both Counts 2 and 3 (cocaine distribution and possession with intent to make the resulting sale) where:

1) in its enactment, Congress intended to punish only once when the evidence shows successive criminal stages, all directed toward consummation of the single criminal undertaking in violation of 21 U.S.C. 841(a)(1); and

2) Salgado's initial distribution of one ounce to undercover officer Lett, and Salgado's possession of the remainder of a kilo for prompt sale to Lett occurred at the same time, in the same place, and with the involvement of the same four participants; and

3) the Double Jeopardy clause restrains the trial court's power to impose those multiple sentences.

SEVENTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the sentences on both Counts 4 and 3 (cocaine possession of 13,020 grams in Glenview at apartment 211 and of 971 grams in Chicago) where:

(1) Salgado's course of conduct—here, several separate but simultaneous acts of constructive possession of different parcels of cocaine, with intent to distribute—only can result in a single violation of 21 U.S.C. 841 (a)(1); and

(2) there is no indication that Congress intended to permit a multiplication of a defendant's offense of possession at any given time upon evidence that he had continuous and uninterrupted constructive possession of different quantities of cocaine that had been separately packaged or stashed in different places at one or several locations; and

(3) counts 3 and 4 are multiplicitous, thereby precluding separate convictions and sentences; and

(4) the Double Jeopardy clause restrains the district court's power to impose those multiple sentences.

EIGHTH QUESTION PRESENTED

Whether the Circuit Court improperly affirmed the 20 years imprisonment enhanced sentences on Counts 1, 2, 3 and 4 since the trial court was without authority to enhance at the December 17, 1985 sentencing hearing where:

1) the government failed to prove beyond a reasonable doubt its factual enhancement allegations that:

> "Salgado was convicted for possession of controlled substances with intent to deliver in the case of People v. Jorge E. Salgado, No. 83-156 before Judge Bailey of the Criminal Courts of Cook County, Illinois on September 9, 1983"; and

2) the Double Jeopardy clause bars the government on remand from having another opportunity to prove to the sentencing factfinder beyond a reasonable doubt the additional fact that Salgado was so convicted before State Judge Bailey in Cook County, Illinois.

NINTH QUESTION PRESENTED

Whether the Circuit Court properly affirmed the trial court's oral imposition of a special parole term for life on December 17, 1985 and the trial court's written December 17, 1985 judgment to that effect and the trial court's December 20, 1985 written docket entry amending the judgment to include a special parole term for life on counts 2 and 3 where:

1) it is clear that no special parole term is authorized by the statute under which Salgado was convicted on Count 3; and

2) contrary to Fed.R.Crim.P. 32(a) and 43, that December 20, 1985 written amendment to the judgment's sentences on counts 2 and 3 was done without Salgado or his counsel being present.

TENTH QUESTION PRESENTED

Whether the trial court exceeded its authority in setting the special parole term at life because Congress could not have intended a conviction's special parole term to be disproportionate to the maximum punishment allowable for the underlying crime, where the applicable substantive statute prescribes imprisonment at not more than 20 years for possession, with intent to distribute, of more than a kilogram and not more than 15 years for such possession of less. 21 U.S.C. 841 (b)(1)(A)(ii) and (b)(1)(B).

ELEVENTH QUESTION PRESENTED

Whether this Court could properly apply the concurrent sentence doctrine to refuse review of Salgado's convictions under any of Counts 1 through 5 where:

1) Salgado was denied his constitutional right to effective assistance in the courts below; and

2) the Parole Commission will use each of the five convictions to set the amount of time of incarceration before Salgado's parole eligibility; and

3) the district court imposed special parole terms on counts 2 and 3; and

4) the dual sentences on either counts 2 and 3 or counts 3 and 4 should merge into one sentence; and

5) the cocaine in count 4 was illegally seized and should be suppressed; and

6) the 20 years sentences on counts 1, 2, 3, 4 and 5 are unlawful for each is greater

than the maximum punishment permitted under the unenhanced sentencing provisions of 21 U.S.C. 843(c) (count 5) and of 21 U.S.C. 841 (b)(1)(B) (Counts 4, 3, 2 and 1 where:

a) as to Counts 1, 2 and 3, less than one kilogram was proven to have been distributed, possessed with intent to distribute, and to have been conspired about; and

b) as to count 4, the jury was only instructed as to the critical elements of the offense under 21 U.S.C. 841(b)(1)(B) and the district court was prohibited from imposing more than an unenhanced 15 year sentence on Count 4 by its own failure to properly instruct the jury that to convict on Count 4, the government had to prove that the quantity of cocaine was greater than one kilogram.

LIST OF ALL PARTIES BELOW

The parties at the Seventh Circuit were: The United States of America and Jorge Salgado.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Undersigned counsel is not presently aware of any other related case about to be presented to this Court. However, certain of Salgado's issues are already pending at but are unresolved by this Court. See Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

IDENTITY OF DEFENSE COUNSEL BELOW

Salgado was represented at trial and at the court of appeals by attorneys Dennis A. Berkson and Henry B. Samuels.

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TO THE UNITED STATES SUPREME COURT:

Petitioner Jorge Salgado respectfully prays that a writ of certiorari issue to review the December 5, 1986 judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The judgment of the district court is unreported. The opinion of the circuit court (Pet.App.A. 6-32)[1] was reported. United States v. Salgado, 807 F.2d 603 (7th Cir. (1986).

JURISDICTION

This appeal stems from conviction of crimes against the United States. The district court for the Northern District of

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[1] Citations to the Appendix to the petition for writ of certiorari will be to its pages as "Pet.App.A.___". Record citations will be to "1R.__" (pp. __ to ___) for the Clerk's Transcript and to the Reporter's Transcript as "2R.__" (pp. 1 to 260), "3R.__" (pp. 261 to 469), "4R.__" (pp. 2 to 19), and "5R.__" (pp. 1 to 40).

Illinois, Eastern Division had jurisdiction under 18 U.S.C. 3231. The circuit court had jurisdiction under 28 U.S.C. 1291. Its judgment and opinion were entered on December 5, 1986. (Pet.App.A. 4-32.) No motion for rehearing was filed. On January 30, 1987, this Court ordered that the time for filing this petition was extended to March 5, 1987. (Pet.App.A. 3.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The numerous applicable statutes, regulations and rules are printed in the appendix attached to the conclusion of this petition. (App.Attach.Pet. 66 to 84.) They are: Fourth and Fifth Amendments, U. S. Constitution; 18 U.S.C. 2, 3231, 4205, 4206 and 4207; 21 U.S.C. 812, 841, 843, 846 and 851; 28 U.S.C. 1254(1), 1291 and 2111; and Fed.R.Cr.Proc. 32(a)(1), 43(a) and 52.

STATEMENT OF THE CASE

On June 28, 1985, Jorge Salgado and co-defendant Hernando Bernal were charged in cause no. 85 CR 357 by indictment with four violations of the narcotics laws of the United States. Salgado was also charged with a fifth violation of those narcotics laws. (Pet.App.A. 63-69.) The district court had jurisdiction under 18 U.S.C. 3231. Count One of the indictment alleged that from at least May 24, 1985, to on or about May 31, 1985, each defendant wilfully and knowingly did conspire together and with unknown persons in violation of 21 U.S.C. 846 to commit the following crimes against the United States:

> (a) to knowingly and intentionally distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); (b) to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); and (c) to knowingly and intentionally use a

communication facility in committing the crime of distribution of a controlled substance, in violation of Title 21, United States Code, Section 843(b).

Eight overt acts were alleged. Count Two alleged each defendant knowingly and intentionally distributed 50.6 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Three alleged each defendant knowingly and intentionally possessed, with intent to distribute, 1,348 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Four alleged each defendant knowingly and intentionally possessed, with intent to distribute, 18,390 grams of a mixture containing cocaine on or about May 31, 1985, in violation of 21 U.S.C. 841(a)(1). Count Five alleged that on or about May 31, 1985, Jorge Salgado knowingly and intentionally used a communication facility, a mobile telephone,

in committing the conspiracy to possess with intent to distribute cocaine, a felony under 21 U.S.C. 846, as more fully described in Count One of that indictment, in violation of 21 U.S.C. 843(b).

On August 7, 1985, Salgado's defense counsel filed several pre-trial motions, including a Motion to Suppress Evidence. (Pet.App.A. 58-62.) Without a hearing, that suppression motion was denied by written memorandum opinion and order on September 5, 1985. (1R. 39.) Salgado was not tried with co-defendant Bernal. (1R. 43.) The evidentiary portion of Salgado's jury trial commenced before District Judge John A. Nordberg on October 17, 1985. (2R. 83.) The jury returned a verdict of guilty on all five counts on October 22, 1985. (1R. 51.)

At the December 17, 1985 sentencing hearing (5R. 1 to 40), the district court imposed sentences on Salgado of twenty (20)

years imprisonment on each count to run concurrently and a $500,000 fine. (1R. 63.) The district court also orally imposed a special parole term of life. (5R. 38; Pet.App.A. 35.) Only one special parole term is contained in the written judgment of the district court. (1R. 63; Pet.App.A. 33-34.) On December 20, 1985, the district court had a docket entry made that read: "(1) Judgment is entered as follows: Judgment and commitment order of December 17, 1985 is corrected to read 'IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life under counts 2 and 3.'" (1R. 64; Pet.App.A. 36.) A timely notice of appeal was filed on December 23, 1985. (1R. 65.) The circuit court entered its judgment of affirmance on December 5, 1986. (Pet.App.A. 4-5.)

STATEMENT OF FACTS

On May 30, 1985, a confidential informant named "Alan" told special agents of the Drug

Enforcement Administration (DEA) Task Force that Jorge Salgado had cocaine to sell. That task force included federal agents and officers from the Chicago Police Department. Alan was introduced to Chicago Police Sergeant Augustus W. Lett. Arrangements were made to have Officer Lett purchase cocaine from Salgado. (2R. 84-86, 117.)

On May 31, 1985, at approximately 2:00 p.m., Alan and Officer Lett went to Alan's residence at 5521 W. Warwick in Chicago. (2R. 86, 167-168.) Lett carried $6,000 in prerecorded funds to purchase a sample of cocaine. (2R. 86-87.) Officer Clarence Travis accompanied Officer Lett and Alan in a separate vehicle. Travis waited near the residence. Travis was to act as Lett's money-man. Travis carried a $46,000 flash roll. (2R. 87, 91, 168.) Approximately seven other Task Force agents took up surveillance positions near the residence. (2R. 167.)

Later that afternoon, Salgado arrived at Alan's residence, got out of his car, and carried two black bags inside. One of the bags was a brief case telephone. (2R. 90, 168-169, 176-177.) Officer Lett was introduced to Salgado. Lett asked about the telephone. Salgado replied, "I'm like you, I don't carry that shit. I got a guy carrying it for me. He is circling the neighborhood, and if everything's okay he is going to bring the stuff in." (2R. 90-91.)

Salgado's portable phone rang. Salgado answered. He listened and said, "Okay." Salgado asked Lett to show him the money. (2R. 91.) Salgado and Lett left the residence through the back door and walked one block to where Officer Travis was parked. At approximately the same time, Salgado's co-defendant Hernando Bernal entered Alan's residence from the front carrying a reddish-orange bag. (2R. 91, 168-169, 172-173.)

Officer Lett introduced Salgado to Officer Travis. Travis showed the flash roll. Salgado counted the money and said to Lett, "Okay. Have your guy park in front of the house and you come in and check the stuff. If the stuff is alright, you take the stuff and I will come out and get the money from your guy." Salgado and Lett went back to Alan's residence. Officer Travis parked as arranged. (2R. 91-92.)

At the residence, Officer Lett met Bernal. An oblong box rested on top of the reddish-orange bag Bernal carried into the residence. Salgado asked Alan to give him a knife and he opened the box. Salgado slit a foil wrapping and exposed a large plastic bag containing a compressed brick of white powder. Salgado said, "This is the finest you can get. You can test it anyway you want." (2R. 93.) Lett told Salgado that he only wanted a three ounce sample to run a test. Salgado said he

did not sell ounces and one ounce would do. Lett agreed to buy an ounce. Salgado weighed an ounce of the powder. Salgado put it in a plastic bag, saying: "You now owe me $1500." (2R. 94.) Lett gave Salgado $1,500 and said: "Okay. If this tests okay I'll see you in two hours. Give me a phone number." Salgado pointed to Alan, saying: "He will reach me." Salgado's portable phone rang, and he spoke to the caller in Spanish. When Salgado finished the conversation, he told Officer Lett: "You see, I am a busy man. That was an order for five kilos." Salgado told Bernal to take the oblong box and meet him with the five kilos. Officer Lett then shook hands with Salgado and left the residence through the rear door. Officer Lett, by radio, told the surveillance agents that he had given Salgado $1500 in government funds and Bernal would be leaving shortly with the remainder of the kilo. Lett went straight to the DEA office and conducted

a chemical field test on the ounce he had received from Salgado and it tested positive for cocaine. (2R. 95-98.)

Bernal and Salgado separately left Alan's residence about four minutes apart, at approximately 3:00 p.m. (2R. 174, 185.) Government agents followed Bernal after he left Alan's residence. Bernal was soon arrested. His automobile was searched. The agents seized the reddish-orange bag and oblong box containing the white powder. Bernal was questioned about the source of the powder and he took the agents to 2600 West Golf Road in Glenview. (2R. 211-213.)

DEA agents followed Salgado for 30 minutes. He was arrested near the 3300 block of West Lawrence Avenue in Chicago. Salgado was searched incident to his arrest. A total of approximately $3,800 was recovered from Salgado. $1,300 of that was prerecorded funds given Salgado by Lett. The rest were

unrelated funds. (2R. 185 to 189.) The officers also recovered from Salgado several keys, a key ring (2R. 187), his portable telephone (2R. 195, 201), and a receipt from A-Alert Lock & Alarm Company. (2R. 196.) That receipt showed that for customer "Salgado," A-Alert had re-keyed the door lock at 2580 Golf Road in Glenview, Illinois on May 28, 1985. A key recovered from Salgado was one of three A-Alert made for the re-keyed lock. (3R. 290-292.) Carrying Salgado's keys, Agent Nyman arrived at the Glenview apartment complex. Using those keys, Agent Bridges determined that they fit apartment 211. Bernal did not take the agents to 211. "He [Bernal] took us to a different building; he took us to 2600; I believe that the address of apartment 211 was 2580." (2R. 214-215.)

VPX Corporation operates apartment buildings at both 2580 and 2600 West Golf Road in Glenview. The distance between the

buildings is approximately 100 yards. (3R. 267, 272.) In addition to common management, each building is maintained by a common janitorial staff. (3R. 280-281, 285.)

After Agent Bridges learned that Salgado had been arrested, Agent Nyman arrived with the seized keys. Then the agents talked to the janitor and determined that Salgado had just recently moved from 2600 Golf Road to apartment 211 at 2580 Golf Road. (2R. 214-215.) At approximately 4:00 p.m., Agent Bridges took the keys from Agent Nyman and unlocked the door to apartment 211. Bridges walked into the apartment with Agents Nyman, Dailey and Riordan. Each room of the apartment was cursorily searched. (2R. 237-239, 245.) Officer Bridges found neither furniture nor a telephone nor anyone in the apartment. (2R. 230, 243-244.) While in that apartment, Bridges saw a white, plastic box in the kitchen (2R. 219, 238, 240), a suitcase

and triple-beam balance scale on the bedroom floor and a money counting machine in the living room. (2R. 226, 229, 238-239.) The agents did not touch any of the items they saw. (2R. 245-246.) After that warrantless search, the agents secured the apartment while a search warrant was obtained. (2R. 246.)

Armed with a search warrant hours later, government agents made a warrant search of Salgado's apartment 211 at approximately 8:30 p.m. on May 31, 1985. The agents photographed the kitchen, living room and bathroom. (2R. 216-218, 239.) They seized a brown cardboard box containing twelve white plastic boxes identical to the one taken from the kitchen counter and the one taken from Bernal. Each measured one and one-half inches high, six inches wide, and eighteen inches long. (2R. 219-223.) They seized from the kitchen counter a white, plastic box containing white powder; a white, plastic box containing white

powder from the kitchen cabinets; a brown cardboard box containing 12 white, plastic boxes each containing white powder from the bathroom linen closet; an automatic money counting machine from the living room floor; a blue suitcase containing brown paper bags, several boxes of plastic bags and a roll of individual sealable or zip-lock type plastic bags, miscellaneous papers and paper clips; a green writing pad with columns of dollar figures in a debit and credit format; and an Ohaus triple-beam balance scale from the bedroom. (2R. 219 to 229.) The white powder Salgado sold Officer Lett weighed 28.1 grams, of which 93 percent was cocaine. The powder seized from Bernal weighed 971 grams, of which 93 percent was cocaine. The net weight of the powder seized from Apartment 211 was (1) 913 grams, of which 96 percent was cocaine; (2) 12,067 grams, of which 93 percent was cocaine; and (3) 40 grams, of which 92 percent was

cocaine. Altogether apartment 211's cocaine had a net weight of approximately 13,360 grams and an average purity of 93 percent. (2R. 255-257.)

On June 11, 1985, officers conducted a second warrant search of apartment 211. Officer Keating found ridge impressions on two pieces of glass and on a bathroom faucet. (3R. 296-297.) Fingerprint expert DuShane identified Salgado's fingerprints on a gray glass on the kitchen counter and a rectangular piece of glass in the living room. (3R. 306.)

ARGUMENTS FOR GRANTING WRIT

The Solicitor General's Expected Position

While Salgado is seeking this Court's independent examination of the merits of these questions presented, Salgado expects that, if invited, the Solicitor General's position herein will in part be similar to Salgado's. Salgado's counsel is aware of Grabina v. United States, 369 U.S. 426, 82 S.Ct. 880, 8

L.Ed.2d 7 (1962). After the district court's resentencing, Grabina again appealed. The circuit court said:

> This defect was not presented on Grabina's appeal from conviction, which this court affirmed. It was raised, however, by a motion for rehearing presented by Grabina, acting pro se on November 15, 1961. The motion was denied without opinion. He then sought and obtained a writ of certiorari. On April 16, 1962, the Supreme Court vacated the judgment and remanded the case to the District Court for resentencing. Grabina v. United States, 369 U.S. 426, 82 S.Ct. 880, 8 L.Ed.2d 7.

United States v. Grabina, 309 F.2d 783, 785 (2nd Cir. 1962).

Consistent with the executive confession of error at this Court in Grabina, Salgado should suffer neither from the circuit court's failure to see "plain error" nor from Salgado's prior attorneys' prejudicial failure to present these numerous errors to the trial and circuit courts. These errors were recognized first by undersigned counsel.

REASONS FOR REVIEWING FIRST QUESTION

In this case, the Seventh Circuit Court affirmed without noticing the numerous "plain errors" first pointed out in this petition. On its own motion, this Court may notice those plain errors. Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945).

Salgado submits that the circuit court reversibly erred in failing to sua sponte notice the questions presented in this petition. Salgado respectfully suggests that the appropriate remedy is for this Court to (a) grant this petition for writ of certiorari and (b) decide the merits of this case. The Bench and Bar need immediate instruction on how to properly try the sophisticated trials where the sentence may be enhanced not only by the large quantities of drugs involved but also by prior convictions for similar controlled substances crimes.

REASONS FOR REVIEWING SECOND QUESTION

In this case, the Seventh Circuit Court's affirmance of the trial court's judgment, directly conflicts with Salgado's constitutional right to effective assistance of trial and appellate counsel. Because Salgado's prior counsels' unprofessional errors so upset the adversarial balance between defense and prosecution, the trial and appellate proceedings were rendered unfair and both judgments below rendered suspect. See Kimmelman v. Morrison, ___ U.S. ___, 106 S.Ct. 2574, 2583, 90 L.Ed.2d ___ (1986).

The Bench and Bar know that the experienced better advocates winnow out weaker arguments on appeal, focus on the central issues, and "go for the jugular." In criminal cases, the effective defense attorney is required to do that in both the trial and appellate courts. See Id; and Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d

821 (1985); United States v. Birtle, 792 F.2d 846 (9th Cir. 1986). See also Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Salgado submits that in the trial and appellate courts his attorneys were so "prejudicially ineffective" that there is a reasonable probability that, but for those deficient performances, the result of the proceedings below would have been different. Without confidence in the outcome below, the remainder of this petition is devoted to pointing out the plain and reversible errors made by the courts below. Of those, only the Fourth Amendment issue was partially litigated by former defense counsels. On that issue, those counsels' performances were less than competent. The remaining issues here went unlitigated by prior defense counsels. As to each instance of incompetency, Salgado incorporates here for brevity's sake, all the

reasons for review of the other questions presented in this petition.

REASONS FOR REVIEWING THIRD QUESTION

In this case, the Seventh Circuit Court's refusal to suppress the apartment 211 evidence, which is the basis for count 4's conviction, is in conflict with the principles of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); and Franks v. Delaware, 438 U.S. 154, 156-157, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), and is in direct conflict with United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974); and United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984).

In overruling Salgado's illegal search and seizure issue, the circuit court placed itself in direct conflict with the

constitutional provision of the Fourth Amendment that the right of the people to be secure in their houses shall not be violated. In this case, the police entered Salgado's apartment 211 without a warrant, without consent, and without exigent circumstances. Then a few hours later, they reentered with a search warrant. That warrant had been obtained based on an affidavit that contained some false statements attributed to officer Dailey. He had made the initial entry of apartment 211. During Dailey's warrantless search, much of the "convicting" evidence was seen in apartment 211. (2R. 237 to 239.) It was seized during the first and second warrant searches of apartment 211 at 2580 Golf Road, Glenview, Illinois. (2R. 215-220; 3R. 294-298.) Salgado's written motion to suppress in effect asserted as facts that (Pet.App.A. 58-62):

On May 31, 1985, Salgado was arrested by DEA agents in the vicinity of 5521 W. Warwick, Chicago, Illinois. Subsequently DEA agents entered and searched apartment 211 located at 2580 W. Golf Road in Glenview, Illinois. Salgado was the alleged lessee of that apartment. No one with valid authority gave valid consent to that search. The search was not made incident to the arrest. The search was not made pursuant to a lawful search warrant. It was made without probable cause and without exigent circumstances. The subsequent warrant search on June 11, 1985 for fingerprints constituted "fruit of the poisonous tree." The agents who obtained and executed the search warrant blatantly failed and neglected to exercise good faith in the procurement and execution of the warrant. The affidavit upon which the warrant was obtained failed to show probable cause that the premises to be searched contained contraband.

In its answer, the government in effect responded (Pet.App.A. 53-57):

> The apartment was never searched without a search warrant. Salgado had the burden of proving the illegality of a search conducted pursuant to a warrant; but Salgado had failed to meet that burden. The trial court's review of the search warrant affidavit would show that there was substantial basis for the magistrate to conclude that the search would uncover evidence of wrong doing. Thus Salgado's motion to suppress should be denied without a hearing.

Without a hearing, the trial court denied Salgado's motion to suppress. (Pet.App.A. 38.)

In the search warrant affidavit (Pet.App.A. 41-47), Lett swore that apartment 211 concealed the following property: "Cocaine, United States currency, books, papers, documents, weighing scales, and other packaging material." Lett's sworn basis of knowledge was that (Pet.App.A. 45-47):

> 10. After the arrest of the Latin male [Bernal], he ... made the following statement to Task Force Agent Maurice Dailey: a. This was the second time that he had done this for Salgado. b. Salgado had just told him to take the kilogram to a particular apartment in Glenview, Ill. This was the apartment where the Latin male had obtained the kilogram of cocaine. Salgado said to go to that apartment and get five more kilograms and then meet with Salgado.
>
> 11. Agent Daley (sic) told me as follows: a. the latin male agreed to take agent Daley (sic) to the Glenview apartment, which he did. The latin male indicated the apartment building, which was 2580 Gulf Road, Glenview, Illinois. b. Agent Daley (sic) checked with the building manager at the address who said that Mr. Salgado lived in apartment 211. c. Agent Daley (sic) went to apartment

> 211, knocked on the door, and received no response. Agent Daley (sic) was able to insert in the door a key that was seized from Salgado when he was arrested. d. Agent Daley (sic) and other Task Force Agents are now securing the apartment from the hallway outside of it.

Thus, the issuing magistrate knew that Bernal did not tell Lett or anyone else about apartment 211 containing any U.S. currency, books, papers, documents, weighing scales, and other packaging materials.

Salgado submits that during trial it became evident that "the list of specific items sought in 211" was obtained during the officers' initial illegal warrantless entry into apartment 211. For obvious reasons, Task Force Agent Maurice Dailey did not testify at trial. Task Force Agent Thomas Bridges did testify at trial. (2R. 210 to 249.) Bridges testified that after arresting Bernal, he had occasion to question Bernal. Contrary to the sworn facts in Lett's affidavit for search warrant, Bernal never took Bridges to that

specific "Apartment 211." Bridges testified that Bernal was questioned as to the source for his white box of powder. After that, Bernal took Bridges to a high-rise apartment building at "2600 West Golf in Glenview." (2R. 213.) At "2600," Salgado's name was on the doorbell. (2R. 215.) It was on the seventh floor. Its number, Bridges did not recall. (2R. 233-234.) Salgado's address was apartment 709 at 2600 Golf Road, VPX Corporation employee Yacktman later testified. (3R. 270.)

Again contrary to what Lett's affidavit stated, Bridges testified he determined from the janitor [not affiant's building manager] that Salgado had moved to apartment 211 at 2580 "a few days before." (2R. 215.) Moreover, contrary to the factual findings of the circuit court, Bridges testified that he himself had "other agents secure a search warrant for that apartment [211]." (2R. 215,

216.) Again contrary to Lett's affidavit and the factual findings of the circuit court, Bridges testified that when he arrived at apartment 211, he walked into the room without a search warrant and at around 4:00 p.m., made a cursory premises search along with Agents Nyman, Riordan, and Dailey [who provided the information to Lett]. (2R. 237 to 239.) While conducting the warrantless search, the officers observed in plain view the following items: a piece of gray glass (2R. 218, 219); a white plastic box containing white powder (2R. 219, 238, 239); 12 plastic white boxes (2R. 223); a money counting machine (2R. 239); a blue suitcase (2R. 236, 239); and an Ohaus triple beam scale. (2R. 229.) These were essentially the same items Lett swore in his affidavit were in apartment 211 of 2580 Gulf Road. Those items were recovered by the officers while executing the search warrant

which was obtained at approximately 8:30 or 9:00 p.m. (Pet.App.A. 48-49.)

At trial, Salgado orally renewed his motion to suppress during Bridge's testimony. Relying on Segura v. United States, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984) [a 5-4 decision], Salgado's attorney argued that the government's answer wrongfully alleged that the officers had not initially entered the premises. The government responded that Segura stood for the proposition that police can go through an apartment and secure the premises so long as any information obtained while inside the apartment is not used in the search warrant affidavit. That is the case here, the prosecutor claimed, asserting: "They didn't use any of that information." The trial court again denied the suppression motion. (2R. 241-243.)

On appeal, the circuit court did not decide the legality of the initial entry made

without a warrant, without consent, and without exigent circumstances. Nevertheless, the Salgado circuit court upheld the warrant searches, theorizing (Pet.App.A. 32):

> We need not weigh these arguments in this case. We hold that the items seen by officer Bridges were lawfully seized later pursuant to a valid warrant, even if the initial search was (though we do not decide whether it was) unlawful.

Salgado submits that in this case, the police illegally entered apartment 211. United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984). Their initial warrantless entry was illegal under the Fourth Amendment because it occurred in the absence of consent, exigent circumstances, or a valid warrant. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 474-78, 91 S.Ct. 2022, 2042-44, 29 L.Ed.2d 564 (1971).

Salgado also submits there was absolutely no valid probable cause to search apartment 211, and all evidence secured during the warrant searches was illegally seized and suppressible. The warrant and its supporting affidavit were related to the illegal initial entry. There was no independent source of knowledge that apartment 211 contained either cocaine or the affidavit's other "listed items" of evidence. Prior to their "cursory" entry, the police only knew Salgado was dealing in cocaine and that Bernal's cocaine had come from 2600 Golf Road, Glenview, Illinois. (2R. 213.) As to the 2580 Golf Road complex's apartment 211, the janitor told the police Salgado had moved there "a few days before."

Why did the Salgado circuit court ignore Payton v. New York, 445 U.S. 573, 591, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980) (an illegal arrest case)? There this Court said:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a fine line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant.

Although Salgado's case concerns the illegal entry into a home, the circuit court below used many ifs, buts and maybes to end up not deciding whether the officers' illegal entry into Salgado's apartment violated the Fourth Amendment. (Pet.App.A. 32.)

During trial in this case, a showing was first made that certain information in Lett's affidavit was false and was obtained in an illegal manner. The question now becomes how has the legal status of the search warrant been affected.

Some courts have answered by saying that the warrant is nonetheless valid <u>if it could have issued upon untainted information in the affidavit</u>. See <u>United States v. Veillette</u>, 778 F.2d 899, 903-904 (1st Cir. 1985)

[reasoning that this squares with Franks v. Delaware, 438 U.S. 154, 171-172, 98 S.Ct. 2674, 2684-2685, 57 L.Ed.2d 667 (1978) and Nix v. Williams, 467 U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) so that the police should not be put in a worse position than they would have been in had they not violated the law], cert denied, ___ U.S. ___, 106 S.Ct. 1970, ___ L.Ed.2d ___ (1986). The Salgado circuit court in part used the same reasoning, but failed to suppress the cocaine seized in apartment 211 by refusing to rule on the unlawfulness of the initial warrantless entry.

Other courts of appeals have disagreed.[2] Contrary to the circuit court's Salgado

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[2] See United States v. Griffin, 502 F.2d 959, 960-961 (6th Cir. 1974), cert. denied, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974). And then some courts suppress parts of the evidence and not other parts. See United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), affirmed on other grounds, ___ U.S. ___, 104 S.Ct. 3380, ___ L.Ed.2d ___ (1984).

opinion, the "savior of some evidence" reasoning from Franks and Nix does not apply to this case.

The Lett affidavit's false information about apartment 211 was furnished to Lett by Officer Dailey, after Dailey made the initial illegal warrantless entry.

It is not Salgado's fault that the government's prosecutor first denied that the officers had illegally entered Salgado's apartment. When at trial that was found to be false, the prosecutor changed tactics. He incorrectly argued that the police had not used any of the illegal information to obtain the search warrant. But for the prosecutor's misrepresentations, Salgado could have obtained a hearing to demonstrate Lett's affidavit for search warrant contains many false statements that can only have been made knowingly and intentionally, with reckless disregard for the truth. Franks v. Delaware,

438 U.S. 154, 156-157, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978). Even if Lett did not "really know" his "affidavit's hearsay from the other officer" had been illegally obtained, the apartment 211 evidence should have been excluded since the "objective reasonableness" standard applies to the collective team of all officers involved. United States v. Leon, 468 U.S. ___, 104 S.Ct. 3405, 3421 n. 24, 82 L.Ed.2d 677 (1984); United States v. Rule, 594 F.Supp. 1223, 1238-1239 (D. Ma. 1984), vacated as to Streifel and Quinn, 781 F.2d 953 (1st Cir. 1986).

Omissions in warrant affidavits are essentially the same as misrepresentations. Id, 594 F.Supp at 1239-1240; United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). If a magistrate is to test probable cause by the "totality of circumstances" test of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76

L.Ed.2d 527 (1983), then Lett's affidavit is rendered void and illegal, since it omits these material facts: the initial entry was illegal; Bernal took the officers to another building; and Bernal did not take the officers to apartment 211. Thus with those purposeful omissions and misstatements by the team of officers, the issuing magistrate was unlawfully deprived of his opportunity to perform his constitutional function. See United States v. Rule, 594 F.Supp. 1223, 1239-1240 (D. Ma. 1984). Those omissions rendered void the magistrate's search warrant, for if those omitted facts had been alleged in the affidavit, the magistrate would not have had probable cause to issue the warrant on apartment 211.

In this case, Salgado was not arrested anywhere near apartment 211. Thus arresting and searching officers were not legally entitled to conduct the cursory examination of

apartment 211 to see if anyone was present who might threaten their safety or destroy evidence. Such "cursory exams" have only been approved when both the accused is arrested at the very house cursorily searched, and the officer reasonably believes there might be someone else on the premises who poses a danger to evidence or the officer.[3] Before the warrantless cursory search of apartment 211, the agents only knew Salgado had rented it a few days before. At the exam time, they had no specific articulative reason to believe armed third persons might be on the premises to destroy evidence. This Court should hold: "Mere suspicions ain't enough, even if the

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[3] See United States v. Jackson, 778 F.2d 933, 936-937 (2nd Cir. 1985), cert. denied, ___ U.S. ___, 107 S.Ct. 308, ___ L.Ed.2d ___ (1986); United States v. Hatcher, 680 F.2d 438, 442-445 (6th Cir. 1982); United States v. Kolodziej, 706 F.2d 590, 596-597 (5th Cir. 1983); United States v. Gardner, 627 F.2d 906, 909-910 (9th Cir. 1980) and cases there cited.

suspicious officers are real experienced doing drug deals. The apartment 211 evidence should have been suppressed since those agents had absolutely no knowledge that apartment 211 probably contained evidence of a crime."

REASONS FOR REVIEWING FOURTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's count 5 sentence of 20 years imprisonment and a $500,000 fine conflicts directly with the applicable sentencing statute, 21 U.S.C. 843(c), and with United States v. Fontanez, 628 F.2d 687 (1st Cir. 1980). In Fontanez, the defendant was convicted for violating 21 U.S.C. 843(b) by using a communication facility. The circuit court affirmed that conviction, but vacated the sentence and remanded for resentencing, since the sentence "exceeds the statutory limit. 21 U.S.C. § 843(c) provides for a sentence of 'not more than 4 years, a fine of not more than $30,000, or both.'" Id., at

691. Salgado prays that the sentence on count 5 should be vacated and the cause remanded for resentencing.

REASONS FOR REVIEWING FIFTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 1, 2, 3 and 4 conflicts in principle both with the due process clause of the Fifth Amendment as previously construed by this Court and with United States v. Davis, 656 F.2d 153, 160 (11th Cir. 1981), cert. denied, 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982); United States v. Simmons, 725 F.2d 641, 643-644 (11th Cir. 1984), cert. denied, 469 U.S. 827, 105 S.Ct. 108, ___ L.Ed.2d ___ (1984); and United States v. Alvarez, 735 F.2d 461, 468 (11th Cir. 1984). Davis indicates that a district court exceeds the punishment allowed by 21 U.S.C. 841 in sentencing a first offender to six years incarceration for possession of marihuana. Alvarez and Simmons indicate that

since the quantity of the controlled substance constitutes a critical element of certain enhanced offenses under 21 U.S.C. 841, the district court is prohibited from sentencing the defendant to more than five years imprisonment if the government fails to allege "the crook" had over 1000 pounds of marihuana.

This Court discussed an analogous "plain error" in a district court's charge to the jury in Screws v. United States, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945).

The Due Process clause requires that in determining an evidentiary sufficiency issue, the reviewing court must also look to the trial court's instructions to the jury. See Jackson v. Virginia, 443 U.S. 307, 317-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979); Benson v. State, 661 S.W.2d 708, 713 (Tex.Cr.App. 1983) (On Second Rehearing) cert. denied, 467 U.S. 1219, 104 S.Ct. 2667,

81 L.Ed.2d 372 (1984); Ortega v. State, 668 S.W.2d 701 (Tex.Cr.App. 1983) (Opinion On Original Submission). The purpose of those instructions is to inform the jury of the law applicable to the case. The jury evaluates the evidence and applies it to the law and definitions given in the trial court's jury instructions. A jury determines guilt or innocence based upon those jury instructions. In fact, Salgado's jury was instructed: "You must not question any rule of law stated by me in these instructions." (1R. 53; 3R. 435.) Salgado was found guilty by the jury, based upon the evidence adduced as viewed in light of the district court's instructions to the jury. While the indictment was directed to Salgado for notice and jurisdiction requirements, it was the jury instructions that "convict." Before the jury could fairly convict Salgado, the jury had to be instructed on the elements that constitute each of the

indictment's alleged five offenses. In the applicable portions of its jury instructions on counts 2, 3 and 4, the district court only permitted the jury to convict Salgado of "illegal involvement with unspecified quantities of a mixture containing cocaine." (3R. 440-443; Pet.App.A. 73-76.) Those instructions might sustain three substantive convictions. However, they are insufficient to support a $500,000 fine and 20 year sentences on counts 2, 3 and 4 under the quantity enhancement provisions of 21 U.S.C. 841(b).

On count 1's conviction for conspiracy, the single agreement to commit different drug offenses is a single criminal offense. That conspiracy is the crime and, however diverse its objects, it violates but a single statute. "For such a violation only the single penalty prescribed by the statute can be imposed." Braverman v. United States, 317 U.S. 49, 54,

63 S.Ct. 99, 102, 87 L.Ed. 23 (1942). As limited by the jury instructions, the count 1 conspiracy [to distribute one ounce] could be punished by imprisonment at no more than 15 years. (R. 440-441; Pet.App.A. 72-73.) By sentencing at 20 years, the district court erred.

In affirming Salgado's illegal sentences on counts 1, 2, 3 and 4, the circuit court erred. It should have noticed those errors on its own motion for:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). Salgado requests that this Court find the trial court erred in imposing these unenhanced sentences above the statutory maximum.

REASONS FOR REVIEWING SIXTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 2 and 3 conflicts in principle with United States v. Palafox, 764 F.2d 558 (9th Cir. 1985)(en banc). In Palafox, the defendant was convicted of one count of distribution of heroin (a sample) and possession with intent to distribute heroin (the balance to be sold), both in violation of 21 U.S.C. 841(a)(1). Palafox met an undercover agent in a parking lot intending to sell him a package of heroin. The agent took a .12 gram sample of the drug from the package and returned the package to Palafox. Almost immediately thereafter, the agent arrested Palafox. He was charged and convicted both of the delivery of the sample and of possession with intent to distribute the rest of the heroin in the package. In its en banc decision, the circuit court held that

"where the defendant distributes a sample and retains the remainder for the purpose of making an immediate distribution to the same recipient at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one." Id. at 560. Although the Palafox court recognized Congress' interest in criminalizing all aspects of drug trafficking, the court found no congressional intent to punish a defendant more than once for a single transaction. Id. at 560-62.

Palafox followed the approach taken in Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). Prince held that although Congress had criminalized both the entering of a bank with intent to rob it and the robbery itself, it did not intend to multiply the punishments. Prince has been followed without division by other Circuits in cases involving multiple penalties for

possession with intent to distribute and distribution under 21 U.S.C. 841(a)(1).[4]

Salgado submits that as to counts 2 and 3, he engaged in a single criminal undertaking to sell a kilogram of cocaine to undercover officer Lett by first providing an ounce sample for $1,500.00, and then retaining the remainder until Lett had tested the sample and quickly returned to purchase the rest of that kilo. (2R. 83-98.) The government can properly charge Salgado with both distribution

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[4] See United States v. Gomez, 593 F.2d 210 (3rd Cir. 1979) (en banc), cert. denied, 441 U.S. 948, 99 S.Ct. 2172, 60 L.Ed.2d 1052 (1979); United States v. Hernandez, 591 F.2d 1019, 1021-1022 (5th Cir. 1979) (en banc); United States v. Woods, 568 F.2d 509 (6th Cir. 1978); United States v. Oropeza, 564 F.2d 316, 323-324 (9th Cir. 1977), cert. denied, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978); United States v. Olivas, 558 F.2d 1366, 1368 (10th Cir. 1977), cert. denied, 434 U.S. 866, 98 S.Ct. 203, 54 L.Ed.2d 142 (1977); United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975); United States v. Curry, 512 F.2d 1299, 1305-1306 (4th Cir. 1975), cert. denied, 423 U.S. 832, 96 S.Ct. 55, 46 L.Ed.2d 50 (1975).

in count 2 and possession with intent to distribute in count 3. Upon his conviction on both counts, the courts below failed to recognize that on these facts the trial court may punish only one of the convictions on counts 2 and 3. Salgado submits that the circuit court reversibly erred in failing to vacate the sentences with instructions to resentence Salgado on either count 2 or 3. See United States v. Wilson, 781 F.2d 1438, 1440 (9th Cir. 1986). There, the circuit court selected which counts would be affirmed and which would be stayed.

REASONS FOR REVIEWING SEVENTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's sentences on counts 3 and 4 conflicts directly with United States v. Woods, 568 F.2d 509, 512-514 (6th Cir. 1978). Woods had been convicted on four separate counts of an indictment charging distribution of about 111.36 grams of heroin (count 2),

and possession with intent to distribute about 111.36 grams, about 115.37 grams, and about 95 grams. All violations were alleged to have occurred "on or about November 12, 1975." The Woods court affirmed the convictions for counts 1 and 2 and the sentence on count 2. But the case was remanded to the district court with instructions to vacate the sentence under count 1 and the convictions and sentences under counts 3 and 4. The Woods circuit court failed to note whether the district court could resentence Woods on the count 1 possession crime.

In deciding if a district court can properly impose multiple sentences here, one must determine the allowable unit of prosecution. United States v. Universal C.I.T. Corp., 344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952). It is clear that the allowable unit of prosecution under 21 U.S.C. 841(a)(1) is a matter within the

discretion of Congress, subject only to constitutional limitations. Bell v. United States, 349 U.S. 81, 82, 75 S.Ct. 620, 621, 99 L.Ed. 905 (1955). Thus for purposes of punishment under 21 U.S.C. 841(a)(1), the reviewer's task is to ascertain whether Congress intended to treat simultaneous constructive possession of several different quantities of cocaine as one act or course of conduct or as multiple acts or courses of conduct. The statutory language of 21 U.S.C. 841(a)(1), however, does not indicate whether such a defendant with multiple stashes commits one or more crimes. As to such cases, the legislative history is equally uninstructive on the appropriate unit of prosecution.

When Congress does not clearly fix the allowable unit of prosecution and its punishment without ambiguity, the ambiguity will be resolved in favor of lenity. Bell v. United States, 349 U.S. 81, 83-84, 75 S.Ct.

620, 622, 99 L.Ed. 905 (1955). In the absence of a clear and unambiguous statement by Congress, the courts are unable to impose multiple sentences for a single course of simultaneous possession of two loads of cocaine at two different places. United States v. Woods, 568 F.2d 509, 512-514 (6th Cir. 1978). Cf. United States v. Griffin, 765 F.2d 677, 682-683 (7th Cir. 1985); United States v. Privett, 443 F.2d 528, 531 (9th Cir. 1971).[5]

Salgado's attorney's failed to raise the multiplicity issues pursuant to Fed.R.Crim.P.

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[5] The Privett court found the three counts stated separate offenses, since different acts of the defendant were involved in each count and since different facts as to the purity of the heroin and its location were involved in each of the counts. The Griffin court held that the defendant's double jeopardy rights were not violated by convictions and sentences on two counts of possession of cocaine, with intent to distribute, where that cocaine found in the car and the cocaine found on defendant's person were of different purities.

12(b)(2). That unauthorized omission did not waive Salgado's Double Jeopardy claims herein. See Menna v. New York, 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975); United States v. Wyatt, 680 F.2d 1080, 1083 n. 4 (5th Cir. 1982).

Salgado requests this Court hold that while two convictions may result from a single criminal undertaking of two simultaneous possessions of cocaine at separate locations—Bernal's cocaine and cocaine in three different places in apartment 211—the sentences on counts 3 and 4 must be reversed. The full case should be remanded to the district court. Then the prosecution should elect which of counts 2 or 3 a sentence will be imposed upon. The district court should then set aside the conviction on the count not elected by the prosecution. It may then impose sentence only upon the remaining count. See United States v. Colunga, 786 F.2d 655

(5th Cir. 1986); United States v. Bradsby, 628 F.2d 901, 905-906 (5th Cir. 1980). Since the district court may wish to lower the time given in the full sentence package here, all five convictions should be remanded for resentencing on each remaining valid sentence.

REASONS FOR REVIEWING EIGHTH QUESTION

In this case, the Seventh Circuit Court's affirmance of Salgado's 20 years imprisonment sentences on counts 1, 2, 3 and 4, conflicts directly with the applicable enhancement statute, 21 U.S.C. 851, and with United States v. Garcia, 526 F.2d 958 (5th Cir. 1976). On appeal in Garcia, it was contended that the provisions of 21 U.S.C. 851(b) for a second offender sentence were not complied with. The Garcia court in effect noted that at sentencing, the trial court referred to the government's information, but Garcia's "admission of a narcotic conviction" failed to

identify "it as the offense set forth in the information" which the government had filed prior to trial pursuant to 21 U.S.C. 851. Since to the circuit court it was doubtful that a substantial compliance would suffice, the Garcia court affirmed the judgment of conviction, but vacated the sentence and remanded the cause for resentencing so the 21 U.S.C. 851 requirements as to sentencing could be carried out. Similar resentencing was approved in United States v. Purcell, 715 F.2d 561 (11th Cir. 1983) and United States v. Cevallos, 538 F.2d 1122 (5th Cir. 1976).

Invoking the provision of law by written pretrial notice to the trial court and Salgado pursuant to 21 U.S.C. 851(a)(1), the government gave notice to Salgado of its intent to seek enhanced punishment upon conviction in this case, because of

> "... Salgado's September 9, 1983 Illinois conviction for possession of controlled substances with intent to deliver in the

case of People v. Jorge E. Salgado, No. 83-156 before Judge Bailey of the Cook County Criminal Courts." (1R. 45.)

On December 17, 1985, the district court conducted its full sentencing hearing. (5R. 1-40.) On counts 1 to 4, Salgado was sentenced under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B). (App. Attach. Pet. 75 to 77.) First offenders under that statute face a maximum term on Counts 1 and 2 at 15 years (if under one kilogram proven) and at 20 years on Counts 3 and 4 (if over one kilogram proven).

Salgado submits the district court reversibly erred in imposing those sentences of 20 years imprisonment on Counts 1, 2, 3 and 4. Those sentences were in excess of the maximum unenhanced punishment legislated in 21 U.S.C. 841 for first offenders. While those sentences were under the maximum enhanced punishment legislated in 21 U.S.C. 841 for second offenders, the district court was without jurisdiction under 21 U.S.C. 851 to

treat and sentence Salgado to enhanced punishment by reason of one alleged prior conviction, because (1) the government failed to introduce any supporting evidence at sentencing; (2) the government failed to sustain its burden of proof beyond a reasonable doubt on the factual issue alleged for enhancement in the government's notice pursuant to 21 U.S.C. 851 (a)(1); and (3) pursuant to the Fifth Amendment and 21 U.S.C. 851(b), all courts must treat as a "denial" Salgado and his counsel's remaining silent at sentencing on the issue of whether Salgado's prior conviction was "the exact conviction" alleged in the government's enhancement notice. (5R. 1-40.)

A district court is without authority to impose an enhanced sentence unless the statutory requirements of 21 U.S.C. 851(a)(1) and (b) were met. Hardy v. United States, 691 F.2d 39, 42 (1st Cir. 1982). Strict

compliance with 21 U.S.C. 851(b) is required. United States v. Ramsey, 655 F.2d 398, 400 n. 7 (D.C. Cir. 1981). The government, however, did not complain of its and the district court's noncompliance with 21 U.S.C. 851. Thus, the government waived any question regarding "trial error" on appeal by not objecting to the district court's procedures during the sentencing hearing on December 17, 1985. See Ortega v. State, 668 F.2d 701 (Tex.Cr.App. 1983)(Opinion on original submission).

The trial court's sentences on counts 1, 2, 3 and 4 are erroneous and must be set aside. Is Salgado entitled to more than a resentencing hearing? At the resentencing hearing, the government should be barred from again seeking sentences enhanced by prior convictions. Having received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, 437 U.S. 1,

16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978), the government is not entitled to another opportunity. Congress used the reasonable doubt standard to indicate that in enhancement sentencing proceedings, it is the government, not the defendant, that should bear "almost the entire risk of error." Addington v. Texas, 441 U.S. 418, 424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).

Salgado's initial sentencing enhancement proceeding was supposed to be like a trial on the question of guilt or innocence. Thus, with respect to any enhancement penalty at his resentencing, the protection afforded by the double jeopardy clause to one acquitted by a jury is available to Salgado. See Bullington v. Missouri, 451 U.S. 430, 447, 101 S.Ct. 1852, 1862, 68 L.Ed.2d 270 (1981).

REASONS FOR REVIEWING NINTH QUESTION

In this case, the Seventh Circuit's affirmance of the trial court's imposition of

a special parole term on counts 2 and 3 on December 20, 1985, conflicts directly with Hazelwood v. Arnold, 539 F.2d 1031 (4th Cir. 1976). Additionally in this case, the Seventh Circuit's affirmance of the trial court's imposition of a special parole term on count 3 conflicts directly with 21 U.S.C. 841(b)(1)(A) and United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986). In Santamaria, the circuit court vacated the special parole term imposed after conviction, like Salgado's on count 3, of knowing possession with intent to distribute one kilogram or more of a mixture containing cocaine in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), since a special parole term is not authorized for an offense that involves one kilogram or more of cocaine. This Court should hold that the special parole term is not legally part of Salgado's sentence on Count 3.

In Hazelwood, the circuit court remanded for resentencing. The district court reversibly erred in sentencing Hazelwood in abstentia by later imposing special parole terms to the existing sentences on counts 2 and 3. See Fed.R.Cr.P. 32(a) and 43; United States v. Behrens, 375 U.S. 162, 84 S.Ct. 295, 11 L.Ed.2d 224 (1963). All circuit courts that have addressed the question have held that a prisoner must be present and be represented by counsel when the district court amends an existing sentence by adding a mandatory parole term.[6]

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[6] Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974); Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974); United States v. Mack, 494 F.2d 1204 (9th Cir. 1974); Caille v. United States, 487 F.2d 614, 616 (1973). See also Birdwell v. United States, 345 F.2d 877 (9th Cir. 1965); and James v. United States, 348 F.2d 430, 432 (10th Cir. 1965); United States v. Rozanc, 326 F.2d 487 (3rd Cir. 1964).

As to Counts 2 and 3, Salgado also submits that the district court erred in imposing a special parole term three days after the sentencing hearing. The district court's written judgment reads in part: "IT IS FURTHER ORDERED that the defendant shall serve a special parole term for life." (Pet.App.A. 34.) By a December 20, 1985 docket entry, the clerk of the district court noted that the district court had imposed as part of the sentences special parole terms of life on both Counts Two and Three. At the sentencing hearing, the district judge orally said (5R. 38): "The court also will impose a lifetime special parole term on the defendant."

A special parole term on counts 2 and 3 was neither specifically imposed orally on December 17, 1985, nor incorporated into the written judgment of the district court on December 17, 1985. Thus, there is no need to

resort to the rule that "where there is a conflict between the oral and the written versions of a sentence, the former is controlling." United States v. Clark, 741 F.2d 699, 707 (5th Cir. 1984); see also Schurmann v. United States, 658 F.2d 389, 391 (5th Cir. 1981).

REASONS FOR REVIEWING TENTH QUESTION

The lifetime special parole term imposed in this case conflicts directly with Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Solem holds that the Constitution requires the sentence to be proportionate to the crime for which a defendant has been convicted. Congress has determined that the proper range of punishment for a first offender is respectively 15 or 20 years for possession of less or more than one kilogram of cocaine, with intent to distribute. Therefore, Salgado submits any imposed special parole term should not exceed Congress'

determination as to what is the proper range of punishment for the very crime for which the defendant was convicted.

Most courts have agreed that a lifetime special parole can be imposed under 21 U.S.C. 841(b)(1)(B).[7] However, no court has considered this question in light of the Solem reasoning. Rather, those courts have considered the constitutionality of 21 U.S.C. 841 (b)(1)(B) and related matters, including arguments that a special parole term should

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[7] See United States v. Waldon, 578 F.2d 966, 972 (3rd Cir. 1978); United States v. Rich, 518 F.2d 980, 986 (8th Cir. 1975), cert. denied, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976); United States v. Dayton, 592 F.2d 253, 254 (5th Cir. 1979), rehearing denied en banc, 604 F.2d 931, cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), supplemented cert. denied, sub nomine Flanagan v. United States, 445 U.S. 971, 100 S.Ct. 1665, 64 L.Ed.2d 249 (1980); Walberg v. United States, 763 F.2d 143, 148-149 (2nd Cir. 1985); United States v. Bridges, 760 F.2d 151, 153 (7th Cir. 1985), and cases cited therein. Cf. United States v. Tebha, 578 F.Supp. 1398 (N.D. Cal. 1984), reversed, 770 F.2d 1454 (9th Cir. 1985).

not exceed the actual prison term imposed. Through 21 U.S.C. 841(b)(1)(B), Congress has granted the trial courts discretion in assessing special parole terms. However, only such term whose length is proportionate to the offense, may constitutionally be imposed. It follows the district court may not constitutionally impose any special parole term whose length is above the maximum provided by law for the primary offense. In light of the allegata, probata and the trial court's instructions authorizing conviction only for the lesser included unenhanced offenses, Salgado could have received no more than 15 years imprisonment on counts 2, 3 and 4 plus a constitutionally proportionate special parole term of no more than 15 years.

REASONS FOR REVIEWING ELEVENTH QUESTION

Salgado believes that this Court should not apply the concurrent sentence doctrine in this case. Its application would be improper.

There is a significant likelihood that with any of the five convictions going unreviewed, Salgado will suffer adverse collateral consequences (lengthened incarceration = reduced parole opportunity). Without a reversal of count 4's conviction, the Parole Commission has noticed Salgado to plan on 120^{+} months incarceration. (Pet.App.A. 91-92.)

Salgado suggests it would be improper for this Court to invoke that doctrine because (1) numerous errors need fixing; (2) judicial correction of those errors will greatly affect the time at which Salgado becomes eligible for parole; and (3) there are numerous reasons for abolition of that doctrine. See United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984). Compare Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

CONCLUSION

For those reasons, Salgado respectfully suggests that the question presented

previously to the circuit court is ripe for resolution by this Court. However, without resolving the questions presented, this Court could grant this petition for writ of certiorari and order the district and circuit courts' judgments vacated, and the cause remanded to the district court for resentencing or to the circuit court to conduct such further or other proceedings as may be proper to afford that court and the parties an opportunity to address all the questions presented by this petition. See Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666, 62 S.Ct. 853, 86 L.Ed. 1103 (1942). Of course, this Court may wish to grant certiorari here in light of the significant impact Salgado's questions will have on all lower federal courts. Here this Court could resolve, once and for all, this case's trial and appellate issues. Those issues are of crucial importance. The new November 1986

drug legislation has greatly altered many sentencing provisions of the controlled substances laws to provide for much more quantity enhancement. This Nation is trying to not lose its War on Drugs. That War is ultimately being waged, in courtrooms throughout this country, when prosecutors attempt to properly obtain convictions and long sentences for serious traffickers. The Bench and Bar need this Court's immediate instructions on "how to do it right the first time." Salgado provides that teaching tool.

DATED: February 18, 1987.

Respectfully submitted by
Petitioner's Attorney,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO. _____

JORGE SALGADO, Petitioner

V. UNITED STATES OF AMERICA, Respondent

APPENDIX ATTACHED TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

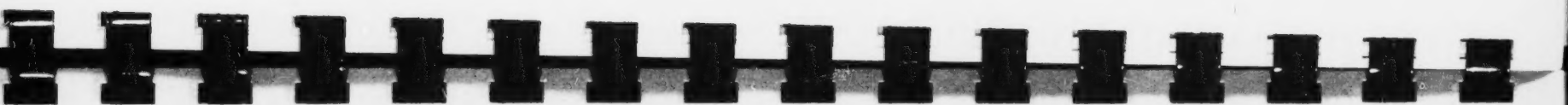
RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The Constitution's Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution's Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."



28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....
> > (June 25, 1948, C. 646, 62 Stat. 928.)

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

(June 25, 1948, C. 645, 62 Stat. 826.)

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
> (June 25, 1948, ch 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

18 U.S.C. 4205 provides in part:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.
>
> (b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but

shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.
(Pub. L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 222.)

18 U.S.C. 4206 provides:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays,

after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.
(Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.)

18 U.S.C. 4207 provides:

> In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:
>
> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
>
> (3) presentence investigation reports;
>
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;
>
> (5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and
>
> (5)[1] reports of physical, mental, or psychiatric examination of the offender.

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[1] So in original. Two paragraphs (5) have been enacted.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available. (Pub.L. 944-233, § 2, Mar. 15, 1976, 90 Stat. 224.)

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

*****

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

*****

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides (footnote omitted):

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than

$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

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(c) Special parole term

A special parole term imposed under this section or section 845 or 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was

spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 or 845a of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 843 provides in part:

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Penalties

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.
(Pub.L. 91-513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95-633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776.)

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
(Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

21 U.S.C. 851 reads: Proceedings to establish previous convictions

(a) Information filed by United States Attorney. (1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.
(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction. If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any

challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing. (1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.
(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be

waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence. (1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior conviction, the court shall proceed to impose sentence upon him as provided by this part [21 USC §§ 841 et seq.]
(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part [21 USC §§ 841 et seq.] The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part [21 USC §§ 841 et seq.] may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.
(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 411, 84 Stat. 1269.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.
> (May 24, 1949, C. 139, § 110, 63 Stat. 105.)

Fed.R.Cr.Proc. 32(a)(1) provides:

> (1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall
>
> > (A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);
> >
> > (B) afford counsel an opportunity to speak on behalf of the defendant; and
> >
> > (C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> The attorney for the government shall have an equivalent opportunity to speak to the court.

Fed.R.Cr.Proc. 43(a) provides:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed.R.Cr.Proc. 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.